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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-635

DANIEL A. DONOVAN, CHARLES BRENNICK and JOHN BRENNICK, Co-Partners doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Petitioner herein submits this reply to the Brief, filed by the Solicitor General, Department of Justice and General Counsel of the National Labor Relations Board, in opposition to the Petition for Writ of Certiorari.

In its Brief to this Court, the Solicitor General and General Counsel proffer a legal argument which:

1) was not previously adhered to by the Board in the instant case;

2) is contrary to the legal argument made by General Counsel in his Brief to and at oral argument before the Court of Appeals; and

3) is directly at odds with the legal standard adopted and relied upon by the Second Circuit.

The gravamen of Petitioner's contentions before this honorable body, the Court below and the National Labor Relations Board is that the "balancing" of the respective wrongdoings of an employer and a union is not a proper standard by which to determine whether an otherwise appropriate bargaining order should be withheld.

1) *The Board Applied a Balancing Test.*

The National Labor Relations Board conferred the benefit of a remedial bargaining order upon a union which had engaged in serious strike misconduct ". . . while recognizing that the matter . . . [was] not altogether free from doubt. . . ." (Pet. Appendix C, p. 23a). A plain reading of the Board's Decision (Pet. Appendix C, p. 22a-24a) reveals that the Board did, in fact, "balance" the comparative wrongdoings of the employer and the union in reaching its conclusion not to withhold a bargaining order.

2) *General Counsel in Its Brief Acknowledged That the Board Had Balanced.*

In its Brief to the Second Circuit, relevant sections of which are annexed hereto, the General Counsel stated that the Board had utilized a "balancing" test.

> "Here, however, the Company contends that the strike misconduct forecloses such a remedy. But under all the circumstances here, the Board found that the strike misconduct, though not to be condoned, did not *on*

> *balance* require withholding of a remedial bargaining order. . . ." (G. C. Brief to the Court of Appeals at p. 33). (Emphasis added)

General Counsel further stated:

> "The Company's contention . . . that the Board could not, in reaching its decision, *weigh* both the effect of the employer's unfair labor practices on the election process and the gravity of the union's misconduct is *clearly wrong*. . . ." (G. C. Brief to the Court of Appeals at p. 37, footnote 26). (Emphasis added)

3) *The Balancing Test Was Carried Forward in Oral Argument Before the Second Circuit.*

Moreover, in oral argument before the Court of Appeals, Counsel for the General Counsel stated that the Board had "balanced" the Union's misconduct against that of the Employer.

4) *The Second Circuit Adopted the Balancing Test.*

In enforcing the Board's order, the Court of Appeals, without explication and in apparent reliance upon the argument proffered by General Counsel, sanctioned the Board's use of a "balancing test":

> ". . . [the Board] *balanced the Union's illegal activities during the strike against the Company's actions both before and after the strike, measuring, as was its duty, the effect of the Company's violations against the gravity of the Union's misconduct in deciding whether a bargaining order was appropriate.*" (Pet. Appendix A, p. 10a). (Emphasis added)

• • • •

"The excesses by the union in the course of its strike were unwarranted and illegal. . . . But we simply cannot find, *on balance,* that the union activity should foreclose the issuance of this bargaining order." (Pet. Appendix A, pp. 12a-13a). (Emphasis added)

• • • •

"The fashioning of remedies is particularly difficult where, as here, *the legal standard to be applied involves a balancing test* and both sides are shown to have been guilty of misconduct. Ultimately the collective facts when sorted and collated show the Company to be the more guilty party. . . ." (Pet. Appendix A, p. 13a). (Emphasis added)

5) *The Solicitor General and General Counsel Now Abandon the Balancing Test.*

Before this Court, however, the Solicitor General and the General Counsel now assert that the Board conducted a proper *Gissel* inquiry and did not engage in a superficial "balancing" test in determining whether an otherwise appropriate bargaining order should be withheld (Board's Brief in Opposition, p. 7, footnote 5). General Counsel's "bootstrap" argument is belied by the record herein. Indeed, and most importantly—the opinion of the Court of Appeals, affirming the Board's Decision and Order, and on which the Petitioner has applied for a Writ of Certiorari is, without question, predicated upon a legal standard involving a "balancing" test. Therefore, General Counsel and the Solicitor General have raised for the first time in their Brief in Opposition a legal argument which departs from the legal standard previously applied by the Board herein and adopted by the Court of Appeals. This attempt to change legal standards is manifestly improper.

Moreover, this change in legal standard is an obvious attempt to mislead this Court into thinking that a proper standard was applied at all stages of this proceeding, and that the Petition merely seeks to have this Court review the findings of fact made by the Second Circuit. The fundamental issue before this Court is the propriety of the balancing test which was clearly applied by the Board and the Court of Appeals. It is obvious from this attempt that General Counsel and the Solicitor General now feel that balancing is an improper standard and cannot be sustained. At the very least, the Respondent's abandonment of its prior standard further warrants the granting of the Writ of Certiorari.

The Brief in Opposition does not address the legal issues raised by the Petition and should therefore be disregarded by this Court.

WHEREFORE, the Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Pages 33 and 37 of General Counsel's Brief to the Court of Appeals for the Second Circuit

Here, however, the Company contends that the strike misconduct forecloses such a remedy. But under all the circumstances here, the Board found that the strike misconduct, though not to be condoned, did not on balance require withholding of a remedial bargaining order customary under the principles of *Gissel* to remedy the Company's pervasive and prolonged unfair labor practices of the character here involved. Considering both the relatively limited extent of employee misconduct and the fact that the Union's misconduct had been made the subject of a consent Board order enforced by a judgment of this Court, the Board concluded that "the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act" (A. 268A). It reasoned that to deny these employees [sic] the rights normally attendant upon their designation of a majority representative when the holding a free election has been made impossible by the Company's own unlawful acts would leave the employees without any effective means of exercising their rights under the Act and at the same time reward the Company for its own wrongdoing (*ibid.*). Indeed, it would permit the Company to evade its statutory duty to deal with the representative which a majority of its employees had freely chosen even in the face of intense unlawful Company opposition. Thus, the end result would be to enable the Company to achieve the precise object of the campaign of coercion which it conducted.

Further, with regard to the strike misconduct, the Board found that, viewed in the perspective of the 4-month-long strike and the Company's frequent and recurring unfair labor practices, "there were but few instances of misconduct by a relatively small proportion of strikers" (A. 268A). Accordingly, it declined "to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants" (*ibid.*).

748 (C.A. 6, 1972).[26] Cf., *N.L.R.B.* v. *Staub Cleaners Inc.*, 418 F.2d 1086, 1089 (C.A. 2, 1969); *N.L.R.B.* v. *International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907; *MPC Restaurant Corp.* v. *N.L.R.B., supra,* 481 F.2d at 79.

A contrary conclusion is not dictated by this Court's decisions in either *N.L.R.B.* v. *United Mineral & Chemical Corporation,* 391 F.2d 829, 838-841 (C.A. 2, 1968) or *N.L.R.B.* v. *World Carpets of New York, Inc., supra.* In both these cases, this Court refused to sanction a bargaining order where the employer's unfair labor practices were minimal and the union had committed strike violence in support of a demand to be recognized. (*World Carpets,* at 62; *United Mineral* at 838). In neither case, however, did the Court foreclose the Board from issuing a bargaining order despite a union's misconduct, where, as here, the employer's unfair labor practices are so serious that "a prompt and fair means of freely determining majority status has been effectively foreclosed . . ." (A. 269A). Rather, the Court in *United Mineral* observed that "arguably, a union's resort to serious violence to enforce its demands might be disregarded . . . when the employer's conduct has rendered a fair election impossible." 391 F.2d at 841; cf. *World Carpets, supra,* 463 F.2d at 62. The choice to enter a bargaining order in all the circumstances here therefore is a reasonable one, especially since, as both this Court and the Board have recognized, "the employees right to choose their representative survives the Union's misconduct." *United Mineral, supra,* 391 F.2d at 841 n. 17 quoting *Laura Modes Company,* 144 NLRB 1592,

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[26] The Company's contention (Br. 69-71) that the Board could not, in reaching its decision, weigh both the effect of the employer's unfair labor practices on the election process and the gravity of the Union's misconduct is clearly wrong. *N.L.R.B.* v. *World Carpets of New York, Inc., supra,* 463 F.2d at 62 (1972).